

No. 67919-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DONALD LOREN GRABNER,

Appellant.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court erred in finding Donald Grabner used a motor vehicle in the commission of the offense.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

RCW 46.20.285(4) authorizes the Department of Licensing (DOL) to revoke a person's driver's license for one year if the person "uses" a motor vehicle in the commission of a felony. The statute applies only if the offender uses a vehicle to facilitate commission of the crime; it does not apply if the vehicle is the *object* of the crime. Did the trial court err in finding Mr. Grabner "used" a motor vehicle to commit the crime of possession of a stolen motor vehicle, where the car was merely the object of the crime?

C. STATEMENT OF THE CASE

Tyler Thirloway owns a 1995 Subaru Legacy wagon. RP 13.<sup>1</sup> On the evening of June 22, 2011, he and his girlfriend drove the car to Latona Pub in the Green Lake area of Seattle. RP 13. They parked the car outside and entered the pub. RP 13. When they exited the pub about 45 to 50 minutes later, the car was gone. RP 13, 19. Mr. Thirloway had not given anyone permission to use the car. RP 16. He called police. RP 14.

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<sup>1</sup> The verbatim report of proceedings consists of four volumes of transcript. Only one volume, for October 17, 18, and 19, 2011, will be cited in this brief, as "RP."

In the early morning of July 2, 2011, Lynnwood Police Sergeant Jason Valentine was patrolling the area near the Rodeo Inn Hotel in Lynnwood. RP 22-24. As he pulled into the parking lot of the hotel, he noticed Donald Grabner pulling out of the lot. RP 25. Sergeant Valentine turned around to follow Mr. Grabner and entered his license plate number into his computer. RP 25-26. Sergeant Valentine discovered that the license plate was stolen. RP 26-27. He called for backup and when additional officers arrived, they stopped Mr. Grabner's car and arrested him. RP 26-27. They ran the car's vehicle identification number into the computer and discovered that the car was stolen. RP 28. The car belonged to Mr. Thirloway. RP 28.

Mr. Grabner told police, and later testified, that he did not know the car was stolen. RP 29, 61

Mr. Grabner was charged with one count of possession of a stolen vehicle, RCW 9A.56.068. CP 53. After a trial, the jury found him guilty as charged. CP 14, 30.

At sentencing, the court found Mr. Grabner "used a motor vehicle" in the commission of the offense. CP 15. An "Abstract of Court Record" was sent to the DOL informing them that Mr. Grabner was convicted of

the crime of possession of a stolen vehicle and that a motor vehicle was involved in commission of the offense. Sub #46.<sup>2</sup>

D. ARGUMENT

THE TRIAL COURT ERRED IN FINDING MR. GRABNER “USED” A MOTOR VEHICLE TO COMMIT THE OFFENSE, WHERE THE CAR WAS MERELY THE OBJECT OF THE CRIME

1. When a person is convicted of a felony, RCW 46.20.285(4) requires DOL to revoke the person's driver's license if a motor vehicle was used to facilitate commission of the crime but not if the car was merely the object of the crime. RCW 46.20.285(4) provides: “The department shall revoke the license of any driver for the period of one calendar year . . . upon receiving a record of the driver's conviction of . . . [a]ny felony in the commission of which a motor vehicle is used.”<sup>3</sup>

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<sup>2</sup> A supplemental designation of clerk’s papers has been filed for this document.

<sup>3</sup> The statute provides in full:

The department shall revoke the license of any driver for the period of one calendar year unless otherwise provided in this section, upon receiving a record of the driver's conviction of any of the following offenses, when the conviction has become final:

(1) For vehicular homicide the period of revocation shall be two years. The revocation period shall be tolled during any period of total confinement for the offense;

(2) Vehicular assault. The revocation period shall be tolled during any period of total confinement for the offense;

(3) Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug, or under the influence of any other drug to a degree which renders the driver incapable of safely driving a motor vehicle, for the period prescribed in RCW 46.61.5055;

(4) Any felony in the commission of which a motor vehicle is used;

(5) Failure to stop and give information or render aid as required under the laws of this state in the event of a motor vehicle accident resulting in the death or personal injury of another or resulting

In State v. Batten, the Washington Supreme Court held there must be a sufficient nexus between the crime and the offender's use of a motor vehicle to justify revocation of his license under the statute. State v. Batten, 140 Wn.2d 362, 365-66, 997 P.2d 350 (2000). The term “used” in the statute means “employed in accomplishing something.” Id. at 365 (quoting State v. Batten, 95 Wn. App. 127, 131, 974 P.2d 879 (1999), aff'd, 140 Wn.2d 362, 997 P.2d 350 (2000) (quoting Webster's Third New International Dictionary 2524 (3d ed. 1966)). Thus, “the use of the motor vehicle must contribute in some reasonable degree to the commission of the felony.” Id. at 365 (quoting Batten, 95 Wn. App. at 131). In Batten, a sufficient nexus existed between Batten's use of a car and the crimes of unlawful possession of a controlled substance and unlawful possession of a firearm, where Batten used the car as a place to store, conceal, and transport the contraband over a period of time. Id. at 365-66. Because Batten’s use of the car contributed to the accomplishment of the crime, and was not merely incidental to the crime, DOL was authorized to revoke Batten's driver’s license. Id.

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in damage to a vehicle that is driven or attended by another;

(6) Perjury or the making of a false affidavit or statement under oath to the department under Title 46 RCW or under any other law relating to the ownership or operation of motor vehicles;

(7) Reckless driving upon a showing by the department's records that the conviction is the third such conviction for the driver within a period of two years.

RCW 46.20.285.

A car is merely incidental to a crime, and not “used” to commit the crime, if it is used simply as a means of transportation. See, e.g., State v. Wayne, 134 Wn. App. 873, 875-76, 142 P.3d 1125 (2006) (insufficient nexus existed between use of car and crime of possession of cocaine, where Wayne merely drove car while possessing cocaine on his person); State v. Hearn, 131 Wn. App. 601, 610-11, 128 P.3d 139 (2006) (insufficient nexus existed between use of car and crime of possession of methamphetamine, where drugs were merely found inside car); State v. Griffin, 126 Wn. App. 700, 708, 109 P.3d 870 (2005), review denied, 156 Wn.2d 1004, 128 P.3d 1239 (2006) (sufficient nexus existed between use of car and crime of possession of cocaine, where Griffin obtained the cocaine in exchange for giving someone a ride in his car).

In accordance with the reasoning of Batten and the other cases cited, courts also hold that, if a car is merely the *object* of the crime and not used independently as an instrument to facilitate commission of the crime, the statute does not apply. State v. B.E.K., 141 Wn. App. 742, 172 P.3d 365 (2007); State v. Dykstra, 127 Wn. App. 1, 110 P.3d 758 (2005), review denied, 156 Wn.2d 1004, 128 P.3d 1239 (2006). In B.E.K., the juvenile offender was adjudicated guilty of second degree malicious mischief for spray painting a police patrol car. Id. at 744. In determining whether the car was “used” to commit the felony, the Court acknowledged

the car was a necessary ingredient of the crime. *Id.* at 747. Second degree malicious mischief, as charged, required proof that the offender perpetrated the mischief on an emergency vehicle.<sup>4</sup> Thus, there was a “clear relationship” between the vehicle and the crime. *Id.* “But a relationship in any form between the vehicle and the crime is not sufficient.” *Id.* Instead, “the vehicle must be an instrumentality of the crime, such that the offender uses it in some fashion to carry out the crime.” *Id.* at 747-48. Because “B.E.K. did not employ the patrol car in any manner to commit his act of mischief but simply made the patrol car the *object* of the crime,” there was not a sufficient nexus between the crime and B.E.K.’s use of the car to justify suspending his driver’s license under RCW 46.20.285(4). *Id.* at 748 (emphasis added).

In *State v. Dykstra*, by contrast, a car was “used” to commit the crime of car theft, but only because the car was *both* the object *and* an instrumentality of the crime. *Dykstra*, 127 Wn. App. at 12. Dykstra was charged and convicted of five counts of first degree theft for his role in an auto theft ring. *Id.* at 6. Thus, cars were the object of the crimes. *Id.* at 12. But they were also “used” to facilitate commission of the crimes, where: Dykstra and his cohorts used cars to drive around looking for other

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<sup>4</sup> Under RCW 9A.48.080(1)(b), a person is guilty of the felony of second degree malicious mischief if he knowingly and maliciously “[c]reates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle.”

cars to steal; they took possession of the stolen cars by driving them away from the scene; they sat in cars while acting as lookouts; and, after dismantling the engines, they used cars to carry the unwanted parts away for disposal. Id.

California courts similarly hold that, in order for a car to be “used” to commit a crime, it must be more than merely the object of the crime or a means of transportation.<sup>5</sup> See People v. Gimenez, 36 Cal. App. 4th 1233, 42 Cal. Rptr. 2d 681 (1995) (sufficient nexus existed between use of car and crime of vehicle burglary, where defendant used car to carry burglary tools and intended to use car to carry away stolen car radio); In re Gaspar D., 22 Cal. App. 4th 166, 27 Cal. Rptr. 2d 152 (1994) (sufficient nexus existed between use of car and crime of vehicle burglary, where juvenile offender used car to carry and conceal stolen car stereo and burglary tools); People v. Paulsen, 217 Cal. App. 3d 1420, 267 Cal. Rptr. 122 (1989) (sufficient nexus existed between use of car and crime of fraud, where defendant used truck to carry and conceal stolen merchandise); People v. Poindexter, 210 Cal. App. 3d 803, 258 Cal. Rptr. 680 (1989) (insufficient nexus existed between use of car and crime of

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<sup>5</sup> California's statute, California Vehicle Code section 13350(2), requires the Department of Motor Vehicles to revoke the driver's license of an offender who is convicted of “[a]ny felony in the commission of which a motor vehicle is used.” Thus, the statute is almost identical to RCW 46.20.285(4). Batten, 140 Wn.2d at 366. As such, California cases interpreting the California statute are persuasive authority for Washington courts interpreting RCW 46.20.285(4). Id.; Batten, 95 Wn. App. at 130.

theft, where defendant used car merely as a means of transporting himself to the scene, and as a means of transporting himself and stolen property away from the scene).

Thus, where the crime at issue is possession of a stolen motor vehicle, in order for a car to be “used” to commit the crime, the car must be more than the object of the crime.<sup>6</sup> B.E.K., 141 Wn. App. at 748; Dykstra, 127 Wn. App. at 12.

2. The trial court erred in finding Mr. Grabner “used” a car to commit the crime. In this case, the car was merely the object of the crime. Mr. Grabner did not “use” the car in any manner beyond what was necessary to prove the elements of the crime of possession of a stolen motor vehicle. Therefore, under the authorities cited, a car was not “used” to commit the crime for purposes of RCW 46.20.285(4).

This Court reviews the trial court's application of the statute to this set of facts de novo. B.E.K., 141 Wn. App. at 745 (citing State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003)).

Mr. Grabner was convicted of the crime of possession of a stolen motor vehicle after he was stopped by police while driving a stolen car. CP 53; RP 26-28. Thus, the car was a necessary ingredient of the crime and there was a “clear relationship” between the vehicle and the crime.

B.E.K., 141 Wn. App. at 747. “But a relationship in any form between the vehicle and the crime is not sufficient.” Id. If the vehicle is merely the *object* of the crime, it is not “used” to commit the crime for purposes of RCW 46.20.285(4). Id. at 748. Here, the car was merely the object of the crime. Mr. Grabner did not “use” the car as a instrument to facilitate commission of the crime. See Batten, 140 Wn.2d at 365. His possession of the car *was* the crime.

In addition, although Mr. Grabner used the car as a means of transportation, that alone is also insufficient to establish he “used” the car for purposes of RCW 46.20.285(4). See Wayne, 134 Wn. App. at 875-76; Hearn, 131 Wn. App. at 610-11; Griffin, 126 Wn. App. at 708. The use of the car as a means of transportation was merely incidental to the crime.

In sum, the trial court erred in finding Mr. Grabner “used a motor vehicle in the commission of the offense.” CP 15. At the least, the statute is ambiguous when applied to these facts and, under the rule of lenity, this Court must construe the statute in favor of Mr. Grabner.<sup>7</sup> B.E.K., 141 Wn. App. at 745.

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<sup>6</sup> In State v. Contreras, 162 Wn. App. 540, 254 P.3d 214, review denied, 172 Wn.2d 1026, 268 P.3d 225 (2011), Division Three reached a different result, but this Court should not follow Contreras because it is inconsistent with the analysis above.

<sup>7</sup> If the statute's meaning is plain on its face, the Court follows that plain meaning without resorting to statutory construction. B.E.K., 141 Wn. App. at 745 (citing State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)). A statute is ambiguous if it can reasonably be interpreted in more than one way. B.E.K., 141 Wn. App. at 745 (citing Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Review Bd., 127 Wn.2d 759, 771, 903 P.2d 953 (1995)). Under the rule of lenity, if two possible statutory

3. The trial court's order must be reversed and vacated. When a trial court erroneously finds an offender “used” a motor vehicle in the commission of a felony, the court's order that DOL be notified of the offender's conviction must be reversed and vacated. B.E.K., 141 Wn. App. at 748. Here, the trial court found Mr. Grabner “used” a motor vehicle to commit the crime and an abstract of the court record was forwarded to DOL. CP 15; Sub #46. Because the court's finding that Mr. Grabner “used” a motor vehicle to commit the offense was erroneous, the court's order that DOL be notified must be reversed and vacated. B.E.K., 141 Wn. App. at 748.

#### E. CONCLUSION

Mr. Grabner did not “use” a motor vehicle to commit the offense, because the car was not used as an instrument to facilitate commission of the crime, but was merely the object of the crime. Therefore, the trial court's order that DOL be notified of the conviction must be reversed and vacated.

Respectfully submitted this 29th day of March 2012.

  
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constructions are permissible, the Court construes the statute strictly against the State in favor of a criminal defendant. B.E.K., 141 Wn. App. at 745 (citing State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984)).

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DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67919-8-I
	)	
DONALD GRABNER,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |     |  |                   |                                     |
|-----|--|-------------------|-------------------------------------|
| [X] | SETH FINE, DPA<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201    | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] | DONALD GRABNER<br>258265<br>MONROE CORRECTIONAL COMPLEX-WSR<br>PO BOX 777<br>MONROE, WA 98272-0777 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 29<sup>TH</sup> DAY OF MARCH, 2012.

X \_\_\_\_\_ 

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